U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 April 2018

CASE NO.: 2017-STA-00061

In the Matter of:

STEVEN BATES,
Complainant,

vs.

UNITED PARCEL SERVICE,
Respondent.

Appearances:

Steven Bates, *Pro Se*,
For the Complainant

Raymond Perez, II, Esq.,
For the Respondent

Before:
Christopher Larsen,
Administrative Law Judge

DECISION AND ORDER

This is a claim under the employee-protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("STAA" or "the Act"). Steven Bates ("Complainant") contends his former employer, United Parcel Service ("Respondent"), retaliated against him for protected activity when it terminated him on January 30, 2015.

I. PROCEDURAL HISTORY

I held a formal hearing in this case in Fresno, California on December 4, 2017, at which both parties had a full and fair opportunity to present evidence and argument as provided by law and applicable regulations.

At the hearing, Mr. Bates offered Exhibits ("CX") A through V. Respondent offered Exhibits ("RX") A through J. Both parties offered Joint Exhibits ("JX") A through F and filed post-hearing briefs. I received all of the exhibits in evidence. I base the following findings and conclusions on a complete review of the entire record in light of the arguments of the parties, applicable statutes and regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, I carefully considered each in arriving at this decision.

II. ISSUE

1. Whether Mr. Bates engaged in protected activity within the meaning of STAA.
2. Whether Mr. Bates meets the burden of proving his alleged protected activity was a contributing factor in the decision to terminate his employment.
3. Whether Respondent establishes by clear and convincing evidence it would have terminated Mr. Bates' employment in the absence of any protected activity.
4. What damages, if any, is Mr. Bates entitled to?

III. SUMMARY OF THE EVIDENCE

Mr. Bates worked for UPS for 12 years as an "over-the-road" driver responsible for transporting packages between distribution facilities (JX A, p. 18). His last position with UPS was as a driver at UPS Freight's Kettlemen City, California facility (*Id.* at 25).

Mr. Bates received a job bid in January, 2015, which covered a driving route from Kettlemen City to San Diego (JX C; JX D). The bid stated that his start time was 11:30 p.m. with a departure time of 2 a.m. (JX A, p. 32; TR 84 to 86). According to the bid, whoever accepted needed to "work as directed" (JX C; JX D).

Mr. Bates arrived for his run on January 28, 2015, at approximately 11:30 p.m. (TR 91 to 92; JX A, p. 54). Upon arriving at the Kettlemen City facility, Mr. Bates argued with Mr. Robert Gonzalez, the new shop steward (JX A, p. 57 to 58; TR 58 to 59). Mr. Bates swore and yelled at Mr. Gonzalez (JX A, p. 57 to 58). Another employee needed to separate them (*Id.*).

After the incident with Mr. Gonzales, Mr. Bates discussed his scheduled start time with his dock supervisor, John Caldera (TR 89). Mr. Bates told Mr. Caldera that if there was no work to do he was going to go home, but he would return at 1:30 a.m. for his 2:00 a.m. run (JX A, p. 64 and 68). Mr. Caldera asked Mr. Bates to perform "dock work" before his scheduled run at 2:00 a.m. (JX A, p. 61). Dock work does not involve driving an automobile (TR 35 to 36). It included a wide range of tasks at the facility such as driving a forklift to move freight, loading freight at the terminals, assembling freight, or completing paperwork (TR 35 to 36, 78 to 79).

Mr. Bates refused because understood dock work to be voluntary (JX A, p. 61). The parties disagree as to whether Respondent may order Mr. Bates to perform dock work as part of his duties.

Mr. Caldera instructed Mr. Bates to do dock work, and Mr. Bates asked to see where it stated his start time was 11:30 p.m. Mr. Caldera showed him a copy of the schedule and the bid sheet Mr. Bates had signed (TR 91 to 95). Mr. Bates insisted he was a line driver and could go home if the run was not ready (TR 48 to 49). Mr. Caldera disagreed, asserting Mr. Bates must work as directed, including dock work (TR 49). Mr. Bates wanted to get Mr. Osbaldo Meija, the terminal manager, on the phone to resolve the issue (TR 50 to 51). During his deposition, Mr. Bates insisted he was prepared to drive his route and nothing was preventing him from driving, (JX A, p. 53), and that while he had medical restrictions from an unrelated workers' compensation case, he had no medical restrictions on his ability to drive a commercial motor vehicle (JX A, p. 53, 137 to 138).

Mr. Caldera got Mr. Meija on the phone and told him Mr. Bates was refusing to perform dock work (RX E, p. 4 to 5). Mr. Meija told Mr. Caldera to bring Mr. Bates and Mr. Gonzalez into the office (*Id.*). Mr. Caldera left the office to fetch Mr. Bates, but Mr. Bates stated that Mr. Gonzalez was both worthless and a "piece of shit" (*Id.* at 5). Mr. Caldera asked if Mr. Bates would like representation, to which Mr. Bates inquired whether the meeting was disciplinary (RX E, p. 5). Mr. Caldera was not sure, but once Mr. Bates entered the office, Mr. Meija said it was (RX E, p. 5). Upon hearing the meeting was disciplinary; Mr. Bates left the office (RX E, p. 5). Mr. Meija told Mr. Caldera to bring Mr. Bates back to the office because they were not finished, and Mr. Caldera left the office to bring Mr. Bates back (TR 96 to 97; RX E, p. 5).

Outside the office, Mr. Bates told Mr. Caldera he was going to "nip this in the bud" and go home sick (TR 58, 60 to 62, 97; RX E, 5). Mr. Bates did not explain this alleged sickness any further nor did he explain how it limited him from performing any of his work duties. This was the only time he mentioned illness on January 28, 2015. At the hearing, Mr. Bates never asserted, much less testified, that he had been telling the truth when he claimed to be sick, or that he in fact had been sick that day.

Mr. Caldera told Mr. Bates he needed to return to the office to finish their conversation, while Mr. Bates walked to the middle of the dock area to clock out. Mr. Caldera warned him not to clock out three times as Mr. Bates approached the middle of the dock area (RX E, p. 5). Mr. Bates asked some co-workers to be witnesses for him, and Mr. Tomas Rodriquez agreed. Mr. Bates punched out at 11:47 p.m., and the entire incident up to this point had taken 16 minutes (*Id.*). His run would not start for another two hours.

Mr. Bates, Mr. Caldera, and Mr. Rodriquez returned to the office to complete the phone call (*Id.* at 6). Mr. Caldera again told Mr. Meija that Mr. Bates did not want to perform dock work (*Id.* at 6). Mr. Meija got Robert Acorn, a UPS West Region Labor Manager, on the line (TR 29 to 30; TR 98 to 99; RX E, p. 6). He instructed Mr. Caldera to order Mr. Bates to perform dock work (TR 30 to 32, 99 to 100; RX E, p. 6). Mr. Acorn told Mr. Caldera that if Mr. Bates refused, he would be subject to disciplinary action up to and including discharge (JX A, p. 75 to 76). Mr. Bates said he was a driver and they could not make him perform dock work (TR 32; RX E, p. 5). He left the office and began to make a phone call (RX E, p. 7).

After Mr. Caldera told Mr. Acorn that Mr. Bates was not doing his dock work, Mr. Acorn told Mr. Caldera to terminate Mr. Bates for gross insubordination and to take his badge (RX E, p. 7). Mr. Caldera told Mr. Bates he was terminated, took his badge, and walked him out of the facility (TR 97 to 98). Mr. Bates drove himself home, which took an hour to an hour and a half (JX A, p. 138; TR 98). He never told Mr. Acorn he felt sick and could not drive the route that day (TR 100). Mr. Acorn did not learn Mr. Bates had claimed he was sick until a grievance panel in March, 2015, months after his termination (TR 41, 98).

Respondent issued two discharge letters to Mr. Bates on January 30, 2015 (RX G; JX E). The first discharge letter was for "Refusal to Work as Directed and Insubordination" stating Mr. Bates was directed three times to report to and work on the dock in Kettlemen City upon his arrival at work at 11:30 p.m. on January 28, 2015, and refused to follow directions (JX E). The second discharge letter was for "Unprofessional Conduct against fellow UPS Freight coworkers" (RX G). It notes supervisors had warned Mr. Bates about his unprofessional conduct towards his fellow employees on August 27, 2014, and January 16, 2015 (*Id.*).

Mr. Bates filed a charge against Respondent with the National Labor Relations Board (NLRB) over his termination. He alleged Respondent discriminated against him by terminating his employment "in retaliation for his union activities as shop steward" (RX H). The NLRB Regional Director dismissed Mr. Bates' charge after finding "insufficient evidence to establish a violation of the Act" (RX I). On appeal, the NLRB General Counsel affirmed the Regional Director's decision to deny Mr. Bates' appeal (RX J). At no point during the NLRB investigation did Mr. Bates allege he refused to drive his route because he was sick or that Respondent terminated him for failing to drive a commercial motor vehicle (JX A, p. 126 to 127).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standard for Decision

Administrative hearings under STAA are conducted *de novo*. 29 C.F.R. § 1978.107, subsection (b). Consequently, OSHA's conclusions have no persuasive effect, either for purposes of this motion, or in this litigation generally. Congress passed STAA in 1982 to combat the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents" on America's highways. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262, 95 L. Ed. 2d 239, 107 S. Ct. 1740 (1987) (quoting remarks of Sen. Danforth and summary of proposed statute at 128 Cong. Rec. 35209, 32510 (1982)); *see also Lewis Grocer Co. v. Holloway*, 874 F.2d 1009, 1011 (5th Cir. 1989) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles.").

In relevant part, STAA provides that an employer may not discharge, discipline, or discriminate against an employee regarding pay, terms, or privilege of employment when the employee refuses to operate a vehicle because

> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition . . ..

49 U.S.C. § 31105.

According to statute,

> (1) "commercial motor vehicle" means (except in section 31106) a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle—
>
> (A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;
>
> (B) is designed to transport more than 10 passengers including the driver; or
>
> (C) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

49 U.S.C.A. § 31101.

STAA employs the AIR21 two-step analytical framework: (1) whether the complainant has met his burden of establishing that protected activity was a "contributing factor" in the alleged adverse personnel action, and if so, (2) whether the respondent can establish by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. *See Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Nos. 2008-STA-20 and 21 (ARB May 13, 2014).

B. Protected Activity

Mr. Bates does not show he engaged in any protected activity. Therefore, his claim fails. He reasons he engaged in protected activity by refusing to work after becoming ill, because working while ill would violate Department of Transportation logbook regulations (Complainant's Closing Brief, p. 5). Respondent, Mr. Bates reasons, could not legally force him to work after he declared himself off duty thanks to STAA's protection (Complainant's Closing Brief, p. 3).

a. Mr. Bates fails to prove he engaged in protected activity

Mr. Bates fails to prove he engaged in protected activity because he never refused to operate a commercial vehicle. While Respondent does not dispute Mr. Bates was to drive a com-

mercial vehicle after he performed his dock work, it terminated him two hours before he needed to drive a commercial vehicle for refusing to perform dock work.[1]

Mr. Bates fails to meet the burden of arguing dock work is protected under STAA. Nothing in the record indicates dock work is covered under STAA. Dock work included a wide range of tasks such as driving a forklift to move freight or completing paperwork (TR 35 to 36, 78 to 79). There is nothing to indicate it falls under the definition described in 49 U.S.C.A. § 31101, and there is no evidence a commercial vehicle is involved. Mr. Bates provides no convincing argument linking his refusal to perform dock work to any violation of DOT or motor carrier safety regulations. Mr. Bates declares being forced to perform any work while under "off-duty" status violates the Department of Transportation regulations for drivers, but does not explain how. Therefore, Mr. Bates' refusal to perform dock work is not "protected activity" under STAA.

Even if Mr. Bates argued Respondent attempted to violate this regulation by asking him to drive while ill, his argument fails to invoke STAA.[2] Respondent was not asking him to drive a commercial vehicle; instead they were asking him to perform dock work. Therefore, STAA did not apply when he refused. The issue of whether he could drive his route never arose. Instead, Mr. Bates incorrectly assumed that by declaring he was ill to avoid a disciplinary review of his insubordination, he could avoid all future work without providing any further details.

b. Mr. Bates did not subjectively believe he was engaging in protected activity under STAA

In addition, I do not find Mr. Bates made a good faith complaint that he was sick and therefore he did not subjectively believe he was engaging in protected activity. Under the AIR21 framework, the employee only needs to believe he was engaging in protected activity, but the employee's belief must be subjectively and objectively reasonable. *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9 (ARB Feb. 13, 2015). Ultimately, the record indicates Mr. Bates was lying about his alleged illness to avoid discipline for his insubordination. Mr. Bates' contention that it does not matter whether he was actually ill is unsupported by any kind of legal authority.

His own behavior demonstrates his "illness" was fictional. The entire conflict between Mr. Bates and Respondent on January 28, 2015, focused on whether Respondent could force Mr. Bates to perform dock work. Mr. Bates only claimed illness one time on January 28, 2015, after he found out he might be disciplined (TR 58, 60 to 62, 97; RX E, 5). The context suggests he was claiming illness as a way to avoid disciplinary proceedings without suffering adverse consequences. The phrase "nip this in bud" indicates he was looking for a way to avoid discipline without doing dock work. In addition, Mr. Bates never elaborated how his alleged illness prevented him from performing any of his duties, further indicating he was never actually ill, and was instead trying to avoid discipline. Finally, it is difficult for Mr. Bates to claim he was too ill

[1] Both parties argue over whether Respondent could force Mr. Bates to perform dock work, but the scope of Mr. Bates' work is not at issue, and I decline to address it. The sole issue is whether Mr. Bates engaged in protected activity under STAA which concerns the operation of a commercial vehicle. 49 U.S.C.A. § 31105.

[2] Mr. Bates introduces Part 392.3 of the Code of Federal Regulations but fails to cite to it in his brief (CX M).

to drive when he drove for an hour to an hour and a half home after his argument with his superiors (JX A, p. 138; TR 98). Additionally, he had opportunities to claim illness during the disciplinary procedure on January 28, 2015, but did not.

Mr. Bates never made any assertion about being sick in fact at the hearing or in his closing brief. He introduced no evidence to indicate he was actually ill. His failure at the hearing to argue or testify he was actually sick, or to introduce any evidence on this point, suggests his claim of "illness" was untruthful.

I find Mr. Bates was lying when he asserted he was ill on January 28, 2015. Therefore, he cannot assert a subjective belief he was too ill to operate a commercial vehicle safely. *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9 (ARB Feb. 13, 2015). He cannot successfully argue he had a good-faith belief he was refusing to operate a vehicle because he was afraid of violating regulations or standards related to commercial motor vehicle safety, health, or security. He also cannot successfully argue he believed there was a reasonable apprehension of serious injury to himself or the public.

c. Mr. Bates' attempt to report his alleged illness is not a complaint under STAA

Finally, Mr. Bates' attempt to report his alleged illness is not a complaint under STAA because he was not notifying Respondent of a violation of a commercial motor vehicle regulation, standard, or order. Under the Act,

> (a) Prohibitions.--(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
>
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

49 U.S.C.A. § 31105.

"[T]he "filed a complaint" language of STAA § 31105 (a)(1)(A) protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel." *Harrison v. Roadway Express, Inc.*, ARB No. 00 048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002).

Here, Mr. Bates never notified Respondent of a violation of a commercial motor vehicle regulation, standard, or order. Mr. Bates, as reasoned above, told John Caldera he was too ill to perform dock work. Mr. Bates then clocked out. Dock work is not operating a commercial vehicle, and claiming he was too ill to perform dock work is not related to operating a commercial vehicle. There is no evidence to indicate anyone working for Respondent perceived Mr. Bates filed or was about to file a complaint to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order. Therefore, Claimant cannot succeed under 49 U.S.C.A. § 31105(a)(A)(i) or (ii).

C. Knowledge

Even if Mr. Bates was ill, his claim would fail because he did not provide proper notice to Respondent. Mr. Bates must prove, by a preponderance of the evidence, that those responsible for adverse action knew about the protected activity. *Luckie v. United Parcel Service, Inc.*, ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007). In *Herrick v. Swift Transportation Co., Inc.*, ARB No. 05-082, ALJ No. 2004-STA-56 (ARB June 29, 2007), the ARB affirmed the ALJ's finding that the complainant's request for time off did not alert the respondent's management that the complainant was too tired to drive safely or that he was out of hours under the DOT regulations. The request, therefore, did not constitute protected activity under STAA. The mere fact that a complainant notifies a dispatcher that he was sick, without any further elaboration, is insufficient to show a respondent had knowledge of complainant's protected activity. *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-48 (ARB July 31, 2003).

Even if Mr. Bates had been ill on January 28, 2015, he gave his employer insufficient information to invoke STAA. He claimed one time, without further detail, he was ill and would be going home. As noted in *Herrick*, ARB No. 05-082, ALJ No. 2004-STA-56 (ARB June 29, 2007), and *Wrobel*, ARB No. 01 091, ALJ No. 2000 STA 48 (ARB July 31, 2003), it is not enough for a complainant to make a vague and unspecified statement that he or she is ill. To meet the burden of providing knowledge to Respondent under STAA, Mr. Bates needed to be more specific. Instead of providing any details on how his claimed illness would prevent him from safely operating a commercial vehicle, he only claimed he was ill and needed to go home to avoid dock work.

Therefore, even if Mr. Bates had been ill, he failed appropriately to raise the issue properly to invoke STAA whistleblower protections.

D. Disparate Treatment

Mr. Bates also argues he suffered disparate treatment (Complainant's Closing Brief, p. 2), but does not explain how any alleged disparate treatment is related to STAA. He asserts Employer treated other employees who declined dock work, and employees who reported sick, differently than it treated him (*Id.*). But STAA does not protect him from disparate treatment in the absence of protected activity. As set forth above, Mr. Bates never engaged in protected activity. Therefore, his argument fails.

E. CONCLUSION

`Having reviewed the hearing testimony and exhibits, I find:

1. Mr. Bates did not engage in protected activity because he never refused to operate a commercial motor vehicle.
2. Mr. Bates had no subjective belief he was engaging in protected activity, because he knew he was not ill.
3. Even if Mr. Bates had been ill, and even if reporting his illness had been protected activity, he did not provide Respondent proper notice, and Respondent had no knowledge of any alleged protected activity.

V. ORDER

Mr. Bates' complaint is DENIED.

SO ORDERED.

CHRISTOPHER LARSEN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service

(eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of

Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).